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106TH CONGRESS }
1st Session

SENATE

{ REPORT
106-167

**DISTRICT OF COLUMBIA COURT EMPLOYEES
ACT OF 1999**

R E P O R T

OF THE

**COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE**

TO ACCOMPANY

H.R. 858

TO AMEND CHAPTER 17 OF TITLE 11, DISTRICT OF COLUMBIA
CODE, TO PROVIDE FOR PERSONNEL PROTECTION FOR DIS-
TRICT OF COLUMBIA COURT EMPLOYEES



SEPTEMBER 30, 1999.—Ordered to be printed

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DISTRICT OF COLUMBIA COURT EMPLOYEES ACT OF 1999

SEPTEMBER 30, 1999.—Ordered to be printed

Mr. THOMPSON, from the Committee on Governmental Affairs,
submitted the following

REPORT

[To accompany H.R. 858]

The Committee on Governmental Affairs, to which was referred the bill (H.R. 858) to provide personnel protection for nonjudicial employees of the District of Columbia Court System who cooperate with a Congressional investigation, having considered the same, reports favorably thereon with an amendment and recommends by voice vote that the bill as amended do pass.

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I. PURPOSE AND SUMMARY

The purpose of H.R. 858, the District of Columbia Court Employees Act of 1999, is to amend Chapter 17 of Title 11, District of Columbia Code, to provide for personnel protection for District of Columbia court employees.

II. BACKGROUND

Recent History Of District of Columbia Court System

The early 1970s was a time of restructuring for the District of Columbia. In 1970, the District of Columbia Court Reform and Criminal Procedure Act was passed. That Act created the District of Columbia court system that exists today. The Act vests judicial

power over the District of Columbia in two separate court systems—three Article III courts for federal claims (the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court for the District of Columbia) and two Article I courts for local claims (the District of Columbia Court of Appeals and the District of Columbia Superior Court). The D.C. Superior Court became the court of general jurisdiction and the D.C. Court of Appeals became the highest court of D.C., whose decisions are appealable only to the United States Supreme Court.

Over time the local D.C. court system experienced other changes through the D.C. Self-Government and Governmental Reorganization Act of 1973 (Home Rule Act), the District of Columbia Prosecutorial and Judicial Efficiency Act of 1985, and the National Capital Revitalization and Self-Government Act of 1997 (1997 Revitalization Act). Local D.C. Courts are considered Article I courts; however, unlike other Article I courts which are established under Article I, section 8, clause 9, the D.C. Courts are established under section 8, clause 17, the clause giving Congress exclusive legislative jurisdiction over D.C.

Congress, through the 1997 Revitalization Act separated the D.C. court system from the rest of the D.C. government, leaving oversight purely with Congress. The Court's budget is set by Congress and is no longer included as part of the D.C. budget. In addition, court employees are considered federal employees for various civil service benefits, such as retirement, life insurance, and health insurance.

The Current District of Columbia Court System

The local D.C. Courts include the D.C. Superior Court, which is the court of general jurisdiction, and the D.C. Court of Appeals. When there is a vacancy on either court, a seven member commission, the D.C. Judicial Nominations Commission, selects three names from a pool of applicants. The President has 60 days to select a nominee from the list of three candidates supplied by the Commission. The nomination is then sent to the Senate for confirmation. D.C. Judges are appointed for 15-year terms.

The administration of the D.C. Courts is overseen by the Joint Committee on Judicial Administration. The Joint Committee is responsible for personnel practices, accounts and auditing, procurement and disbursement, development and coordination of statistical and management information systems and reports, submission of the annual budget requests, and other administrative matters. The Joint Committee is made up of the Chief Judges of both the Court of Appeals and the Superior Court, one associate judge of the appellate court, and two associate judges of the Superior Court. The Executive Officer of the courts is appointed by the Joint Committee to be responsible for the administration of the Courts subject to the supervision of the Joint Committee.

In addition, the D.C. Commission on Judicial Disabilities and Tenure has the power to suspend, retire, or remove a judge from the D.C. Courts for various reasons.

The D.C. Courts have over 1,000 employees and an annual budget of approximately \$128 million. There were approximately 2,000

cases filed in the D.C. Court of Appeals and approximately 157,000 cases filed in the D.C. Superior Court in 1998. Over the years, the D.C. court system has been recognized as a model by other local jurisdictions and States. Further, the D.C. Courts have various community-oriented programs that allow the judges and court officials to do more than adjudicate and process cases.

Financial management issues

In fiscal year 1998, the D.C. court system began to run low on funds. It decided to withhold payments to attorneys who were paid by the court to represent indigents in criminal cases. The House authorizing and appropriations committees on the District began an investigation of this matter. The Court contends that in 1997, when various court functions, including adult probation, were transferred from the D.C. Courts to the federal government, Congress diminished the Court's budget by an amount greater than that necessary for such functions. However, some Members of Congress have maintained that the Court had been put on notice that it had a budget shortfall and, therefore, should have managed its spending accordingly.

On September 22, 1998, the Chairman Charles Taylor (R-NC) and Ranking Member Jim Moran (D-VA) of the House D.C. Appropriations Subcommittee on the District of Columbia requested the General Accounting Office (GAO) to study the financial operations of the D.C. Courts. Later, the Chairman of the D.C. authorizing committee, Rep. Tom Davis (R-VA), requested to be added as a requestor to the report. The investigation was later expanded to include an investigation of the personnel practices of the D.C. Courts.

During this process, Chief Judge Eugene Hamilton of the D.C. Superior Court issued an administrative order encouraging employees to comply with the GAO audit. Despite the assurances made by Chief Judge Hamilton and the fact that GAO did not indicate any problems collecting information from court employees, H.R. 858 was introduced to ensure there was no retaliation for cooperating with the GAO investigation.

Summary of H.R. 858 as passed by the House

H.R. 858 originally was cited as the "District of Columbia Court Employees Whistleblower Protection Act of 1999." It created a new section in Chapter 17 of Title 11 of the D.C. Code entitled "11-1733. Whistleblower protection for court personnel." The bill would have made D.C. Court personnel subject to Section 1503 of the District of Columbia Comprehensive Merit Personnel Act of 1978 (D.C. Code, sec. 1-616.3) and allow the employees to initiate a law suit in the United States District Court for the District of Columbia. The bill was also retroactive to the passage of Public Law 105-33, the 1997 Revitalization Act.

Problems with H.R. 858 as passed by the House

There were a number of problems with H.R. 858 as passed by the House. First, the House bill makes court personnel subject to D.C. Code sec. 1-616.3, entitled "Complaints of criminal harassment for appearances and testimony before the Council." This section of the Code, which covers testimony before the Council and Congress, was

repealed in 1998. In enacting D.C. Law 12-160, the Whistleblower Reinforcement Act of 1998, the D.C. Council replaced this section of the Code with another.

Like D.C. Code sec. 1-616.3, D.C. Law 12-160 would also provide protection for court employees in their communications with the D.C. Council and Congress. However, it also includes other entities, including all federal, District, state, or local executives agencies. The Committee was concerned that this provision was too broad.

A second issue of concern to the Committee related to whether it is appropriate to subject D.C. court employees to a provision intended primarily for D.C. government employees. As noted above, D.C. Court employees are considered federal employees, not D.C. employees for various employment benefits. Providing protection under a local D.C. merit systems law meant primarily for testimony before the D.C. Council, seemed contrary to Congress' intent of separating the D.C. court system from the rest of the D.C. government.

The third issue was whether extending "whistleblower" protections to D.C. Court employees was appropriate and consistent with the previous decisions made by Congress regarding whistleblower protections. Other Article I courts have no whistleblower protection, although the employees of those courts have other civil service benefits. The other Article I courts include the United States Tax Court (employees are selected competitively), United States Bankruptcy Court (no protections), Federal Court of Claims (no protections), Veterans Appeals Court (no protections), and United States Magistrates (considered federal employees for health benefits and other benefits). In addition, according to the Administrative Office of the U.S. Courts which conducts the nonjudicial administrative business of the federal courts, none of the non-Article I federal courts have whistleblower protections. These courts include Article III and Article IV (Guam, Virgin Islands, and the Northern Mariana Islands) courts.

There may be various reasons why whistleblower protections have not been extended to the federal courts; however, the focus of the Committee was to resolve a simple issue—ensuring that D.C. Court employees have open communication with Congress. To start down a road which might have lasting and enormous repercussions for the judicial system seemed inappropriate and unnecessary.

Finally, the Committee considered the fact that H.R. 858 applied to court "personnel" in general. Court personnel, however, are characterized as either judicial or nonjudicial. The potential implications of including judicial personnel raised questions regarding the integrity of judicial decisions and confidential communications between judges and their law clerks and secretaries, who are not directly involved with Court administration.

Solutions

To resolve the concerns outlined above, and accomplish H.R. 858's intended purposes, this Committee brought D.C. court nonjudicial employees under the protection of 5 U.S.C. Section 7211 rather than D.C. Code sec. 1-616.3. 5 U.S.C. Section 7211 was enacted to ensure open communication between federal workers and Congress for oversight purposes. The Committee felt that this sec-

tion was more appropriate to ensure effective oversight by Congress over the D.C. Courts.

Title 5, Section 7211 of the U.S. Code is a non-whistleblower federal statute that is intended to ensure open communication between Congress and federal employees. The origin of this section of the U.S. Code, also known as the “Lloyd-Lafollette Act,” dates back to 1912. In response to “gag orders” issued first by President Theodore Roosevelt (1902) and then President William Taft (1909), Congress added language in a 1912 appropriations bill nullifying the gag orders. The “gag orders” were restrictions the President placed on executive branch employees regarding their communications with Congress. This language was later placed in the Civil Service Reform Act of 1978 and codified in 5 U.S.C. Section 7211. The purpose of this Act is to allow Congress to obtain uncensored, essential information from federal employees. Congress intended to allow the federal workers direct access to Congress in order to register complaints about conduct by their supervisors and to report corruption or incompetence.

H.R. 858 as amended uses the standard for filing a suit outlined in D.C. Code sec. 1–616.3. This makes it clear when a court employee may file a suit and to which court such employee may file (United States District Court for the District of Columbia).

H.R. 858 as amended also requires administrative exhaustion prior to the employee initiating a lawsuit in federal court. The Joint Committee, which oversees the administration of the Court, including personnel decisions, will have a 60-day period to address any grievances arising from the alleged violation of an employee’s rights under the bill. After the 60 days, the employee may then file a law suit in the United States District Court.

H.R. 858 as amended makes clear that the bill applies only to nonjudicial court employees. Nonjudicial court employees are those employees the Executive Officer has day-to-day control over as described in D.C. Code 11–1725 (relating to the appointment of non-judicial personnel). These do not include the judges or personal law clerks and secretaries of the judges on the Courts. The communications and relationships between such individuals relate so closely to the disposition of specific cases that to interfere with that relationship may produce unintended repercussions for the administration of justice and the integrity of the court system.

Finally, H.R. 858 as amended includes a provision that allows the D.C. Courts, if sued, to file a motion for reasonable attorneys fees and costs. This provision was intended to guard against frivolous lawsuits and as such was not intended to allow such costs to be awarded if the judge finds that the plaintiff had a reasonable and good faith belief that the case was meritorious. However, after H.R. 858 was ordered reported, concerns regarding the effect of this provision were raised by advocates and others, including District of Columbia Councilmember Carol Schwartz, sponsor of the D.C. Whistleblower Reinforcement Act of 1998.

The main concern raised is that this provision will discourage employees from communicating openly with Congress because they could be saddled with large court costs and attorneys fees if they lose their claim of retaliation. Moreover, it has been pointed out that removing this provision will not encourage frivolous lawsuits

for two reasons. First, it is difficult to find attorneys for even the strongest cases because the absence of punitive damages means there is no potential for cases to be financially lucrative through contingency fees. Second, a Federal civil procedure rule already permits sanctions against lawyers who file frivolous suits. Because it appears there would be no adverse effect to removing this “loser-pays” provision and removing it will serve to advance the objectives of H.R. 858, Committee members have indicated their support for an amendment to remove this section from H.R. 858 when it is taken up by the full Senate.

III. LEGISLATIVE HISTORY

H.R. 858 was introduced in the House of Representatives by Rep. Davis (R-VA) on February 25, 1999 for himself and Representatives Moran (D-VA), Morella (R-MD), and Delegate Norton (D-DC). It was referred to the House Committee on Government Reform and then on March 1, 1999 to the House Subcommittee on the District of Columbia. On March 10, 1999, the House Committee on Government Reform ordered reported H.R. 858 by voice vote. The bill was passed by voice vote under suspension of the rules in the House on March 16, 1999.

On March 17, 1999, the bill was referred to the Senate Committee on Governmental Affairs. On April 12, 1999, H.R. 858 was referred to the Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia. The Subcommittee agreed unanimously to the amendment proposed by Chairman Voinovich (R-OH) of the Subcommittee on May 19, 1999.

The full Senate Committee on Governmental Affairs considered H.R. 858 with Senator Voinovich’s amendment on May 20, 1999. The Committee voted to order the bill reported as amended by voice vote.

IV. SECTION-BY-SECTION ANALYSIS (AS AMENDED)

Section 1 entitles the Act as the “District of Columbia Court Employees Act of 1999.”

Section 2 creates a new section to Subchapter II of Chapter 17 of Title 11 of the District of Columbia Code. The new section is entitled “Sec. 11-1733. Court personnel communications with Congress.” It includes definitions for “Congress” and “District of Columbia court” and makes nonjudicial employees of the court federal employees for the purpose of Section 7211 of Title 5 of the U.S. Code. It allows an employee or former employee to file a civil action in the United States District Court for the District of Columbia if (1) he/she reasonably believes his/her rights under Section 7211 of Title 5 of the U.S. Code has been violated, (2) he/she files a grievance with the Joint Committee not later than 270 days after the violation, (3) the Joint Committee makes a final decision or no decision within 60 days after the filing of the grievance, and (4) the civil action is filed not later than one year after the violation. This section also lists the type of relief allowed to the employee or former employee, allows the court reasonable attorneys fees and court costs in certain circumstances, makes the filing of a civil ac-

tion the employee or former employee's exclusive remedy, and requires the D.C. Courts to display notices of the employee's rights.

Section 3 makes the bill retroactive to the enactment of the Balanced Budget Act of 1997, Public Law 105-33 (1997 Revitalization Act).

The title is amended so as to read: "An Act to amend Chapter 17 of Title 11, District of Columbia Code, to provide for personnel protection for District of Columbia court employees."

V. ESTIMATED COST OF LEGISLATION

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 27, 1999.

Hon. FRED THOMPSON,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 858, the District of Columbia Court Employees' Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are John R. Righter (for federal costs) and Susan Sieg (for the state and local impact).

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

H.R. 858—District of Columbia Court Employees' Act of 1999

H.R. 858 would amend District of Columbia statutes to provide for personnel protection for employees of the District of Columbia court who cooperate with a Congressional investigation. Under the legislation, employees or former employees could seek relief from violations by first filing grievances with the Joint Committee on Judicial Administration of the District of Columbia and then, if necessary, filing civil claims in the U.S. District Court for the District of Columbia. If the U.S. District Court were to find that an employee's claim was unwarranted, the legislation would authorize it, upon request, to award the payment of reasonable fees and court costs to the court of the District of Columbia. CBO estimates that enacting H.R. 858 would have little or no effect on the federal budget. The legislation would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

H.R. 858, as ordered reported by the Senate Committee on Governmental Affairs, contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would impose enforceable duties on the District of Columbia with regard to the treatment of court personnel. CBO estimates that the costs of complying with the mandate would be minimal, and thus would not exceed the threshold established in UMRA (\$50 million in 1996, adjusted annually for inflation). H.R. 858 contains no private-sector mandates as defined in UMRA.

The CBO staff contacts are John R. Righter (for federal costs) and Susan Sieg (for the state and local impact). This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

VI. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill. The enactment of this legislation will impose enforceable duties on the District of Columbia with regard to the treatment of court personnel. CBO estimates that complying with the mandate will be minimal and would not exceed the threshold established in the Unfunded Mandates Reform Act. The legislation contains no other regulatory impact.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic and existing law, in which no change is proposed, is shown in roman):

District of Columbia Code

Title 11, Organization and Jurisdictional of Courts

Chapter 17. Administration of District of Columbia Courts

Subchapter I. Court Administration

Sec.

11-1701. Administration of District of Columbia court system.

11-1702. Responsibilities of chief judges in the respective courts.

* * * * *

Subchapter II. Court Personnel

11-1721. Clerks of courts.

* * * * *

11-1733. *Court personnel communications with Congress.*

* * * * *

SEC. 11-1732. HEARING COMMISSIONERS.

(a) With the approval of a majority of the judges of the Superior Court of the District of Columbia in active service and subject to standards and procedures established by the rules of the Superior Court, the chief judge of the Superior Court may appoint hearing commissioners, who shall serve in the Superior Court and perform the duties enumerated in subsection (j) of this section and such other functions incidental to these duties as are consistent with the rules of the Superior Court and the Constitution and laws of the United States and of the District of Columbia.

* * * * *

SEC. 11-1733. COURT PERSONNEL COMMUNICATIONS WITH CONGRESS.

(a) *In this section the term—*

(1) “Congress” means the United States Congress and includes any member, employee, or agent of Congress; and

(2) “District of Columbia court” means the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

(b) Nonjudicial employees of the District of Columbia court shall be treated as employees of the Federal Government solely for purposes of section 7211 of title 5, United States Code (relating to employees’ right to petition Congress).

(c)(1) An employee or former employee may file a civil action in the United States District Court for the District of Columbia for relief of a violation of subsection (b), if—

(A) the employee or former employee reasonably believes that such a violation occurred;

(B) the employee or former employee files a grievance relating to such violation with the Joint Committee on Judicial Administration of the District of Columbia not later than 270 days after the violation occurred;

(C) the Joint Committee—

(i) makes a final decision; or

(ii) makes no decision within 60 days after the filing of the grievance; and

(D) the employee or former employee files such civil action not later than 1 year after the date of the violation.

(2) Relief in an action filed under paragraph (1) may include—

(A) an injunction to restrain continued violation of this section;

(B) rescission of a retaliatory action;

(C) the reinstatement of the employee or former employee to the same position held before the retaliatory action, or to an equivalent position;

(D) the reinstatement of the employee’s or former employee’s full fringe benefits and seniority rights;

(E) compensation for lost wages and benefits; and

(F) the payment by the District of Columbia court of the employee’s or former employee’s reasonable costs and attorney fees.

If the employee or former employee is the prevailing party.

(d) In any civil action filed under subsection (c), the District of Columbia court may file a motion for an award of reasonable attorney fees and court costs. The presiding judge may order such fees and costs to be awarded to the District of Columbia court, if the judge determines that an action brought by an employee or former employee under this section was not well grounded in fact and not warranted by law.

(e) The filing of a civil action in accordance with this section shall constitute the employee’s or former employee’s exclusive remedy under the laws of the United States or the District of Columbia for violation of this section.

(f) The District of Columbia court shall conspicuously display notices of an employee’s protections and obligations under this section,

and shall use other appropriate means to keep all employees informed of such protections and obligations.

